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08/967,473	11/11/1997	THEODORE G. HABING		7145

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MARK A KRULL  
POST OFFICE BOX 7198  
BEND, OR 97708

EXAMINER
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CROW, STEPHEN R

ART UNIT	PAPER NUMBER
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3764

MAIL DATE	DELIVERY MODE
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06/19/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

08/967,473

Applicant(s)

HABING ET AL.

Examiner

Steve R. Crow

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 09 April 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-17 and 19-35 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17, 19-35 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Reissue Applications*

#### *Election/Restrictions*

1. Claims 36-64 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 4/9/07.
- 2.
3. It is noted and agreed that no interference claims are pending , and that the Interference request has been withdrawn.

1. Applicant is reminded of the continuing obligation under 37 CFR 1.178(b), to timely apprise the Office of any prior or concurrent proceeding in which Patent No. 5499956 is or was involved. These proceedings would include interferences, reissues, reexaminations, and litigation.

Applicant is further reminded of the continuing obligation under 37 CFR 1.56, to timely apprise the Office of any information which is material to patentability of the claims under consideration in this reissue application.

These obligations rest with each individual associated with the filing and prosecution of this application for reissue. See also MPEP §§ 1404, 1442.01 and 1442.04.

The amendment filed 49/907 proposes amendments to the claims that do not comply with 37 CFR 1.173(b), which sets forth the manner of making amendments in reissue applications. All new subject matter and new claim language and amendments must be underlined. Please see MPEP 1453.

2. The reissue oath/declaration filed with this application is defective because it fails to contain the statement required under 37 CFR 1.175(a)(1) as to applicant's belief that the original patent is wholly or partly inoperative or invalid. See 37 CFR 1.175(a)(1) and see MPEP § 1414.

3. The reissue oath/declaration filed with this application is defective because it fails to identify at least one error which is relied upon to support the reissue application. See 37 CFR 1.175(a)(1) and MPEP § 1414.

4. The reissue oath/declaration filed with this application is defective because the error which is relied upon to support the reissue application is not an error upon which a reissue can be based. See 37 CFR 1.175(a)(1) and MPEP § 1414.

The Oath states that the original patent does not claim the invention in terms of a foot support that is (a) constrained to move in regulated fashion in a first direction and (b) free to move in unregulated fashion in a second, generally orthogonal direction.

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It is improper to state in the Oath that the errors were due to claim language which was absent in the parent application. Rather, the Reissue must address an error in which the parent claims were too limiting and point out that limiting structure.

Additionally, applicant's stated error being relied upon is not present in the claims presented.

5. The reissue oath/declaration filed with this application is defective because it fails to contain a statement that all errors which are being corrected in the reissue application up to the time of filing of the oath/declaration arose without any deceptive intention on the part of the applicant. See 37 CFR 1.175 and MPEP § 1414.

6. Claims 10-17,19-35 are rejected as being based upon a defective reissue Oath under 35 U.S.C. 251 as set forth above. See 37 CFR 1.175.

The nature of the defect(s) in the Oath is set forth in the discussion above in this Office action.

7. Claims 10-17,19-35 are rejected under 35 U.S.C. 251 as being improperly broadened in a reissue application made and sworn to by the assignee and not the patentee. A claim is broader in scope than the original claims if it contains within its scope any conceivable product or process which would have infringed the original patent. A claim is broadened if it is broader in any one respect even though it may be narrower in other respects.

***Claim Rejections - 35 USC § 112***

8. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

9. Claims 10-17,19-23 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term “through” is not connoted to means “past” or “across”. Rather it is used to describe the envelope of motion of the foot pedals. In response to applicant’s remarks, a box could be confined within the closed path but the path would not be described as “through a boxed path”.

The pedal path of travel is not generally elliptical due to the non symmetry of the closed path.

It may be possible to claim the path as a closed path having a **majority** of its path described as an elliptical path.

In claim 8 line 2, “further” should be inserted after “movement”.

In claim 25 line 3, the language “ between the frame, the right foot support” is not understood.

In claim 28 lines 2-3 are not understood. The preamble recites an apparatus but line 3 recites “on each side of the apparatus” referring to the frame which is part of the apparatus.

***Claim Rejections - 35 USC § 102***

10. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

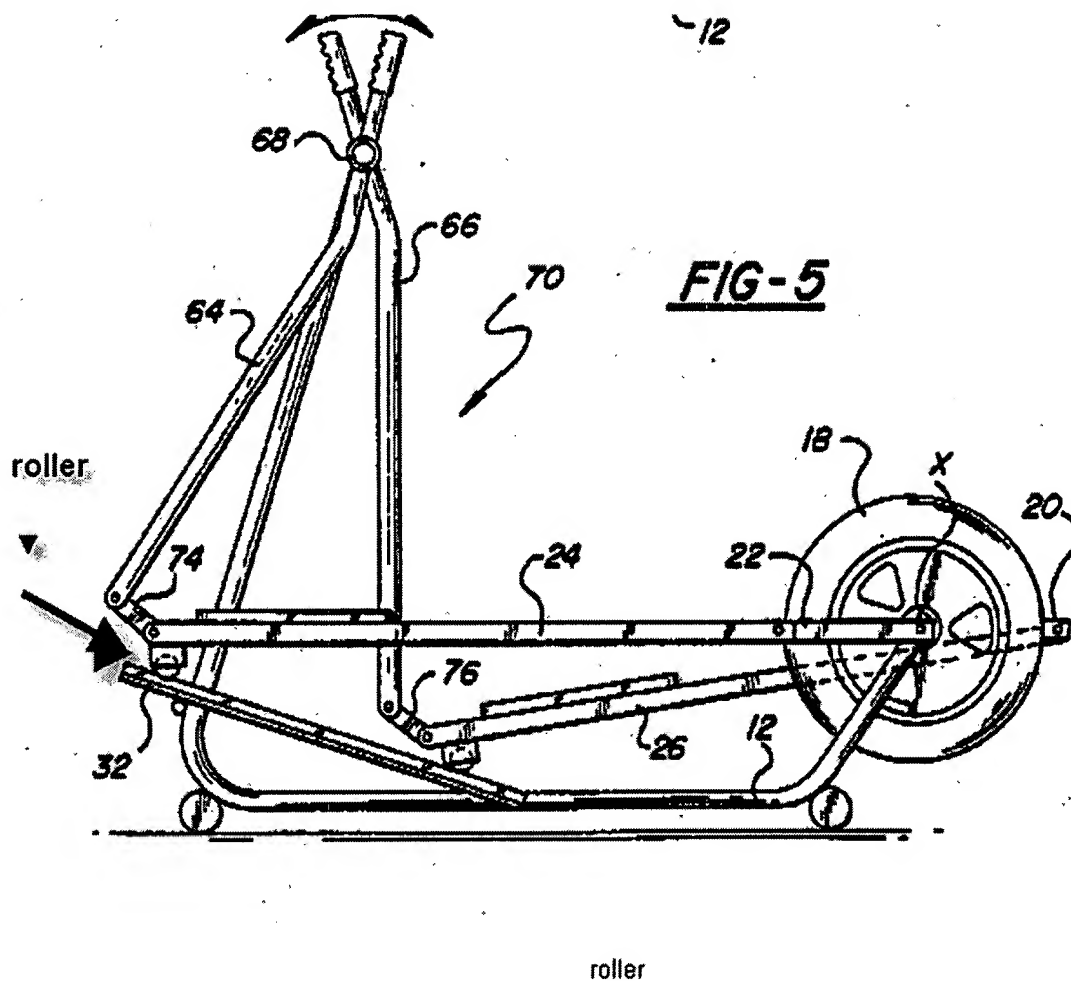
(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

11. Claims 16-17,20,22-25,28,30,33,34,35 are rejected under 35 U.S.C. 102(a,b) as being anticipated by Miller (5383829) or Miller (5242343).

Miller shows an exercise device having cranks 22, rocker links 64, rigid members 24 or 74 (with analysis to claims 28,31,et al ) , and foot supports (unlabeled).

As to claim 17, note the rollers shown in figure 5.



As to claim 19, note the pivot 74 on the rocker link assemblies.

As to claims 28 and 31, element 74 can move in a generally orthogonal direction, and crank 22 is indirectly connected to the rigid members 64-74.

As to claim 30, applicant's foot supports appear to not remain in a constant orientation; therefor, in a similar manner to applicant's generally constant pedal orientation, the Miller foot support orientations are considered to be generally constant.

As to claim 35, the user of Miller's device inherently determines the movement, and there is a vertical component to the movement.



***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. Claims 33-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller (5383829) or Miller (5242343) in view of Breunig .

Miller discloses ramps 30-32 upon which the rollers travel to help in producing the elliptical path.

Breunig teaches the use of an adjustment means for altering the angle of inclination of a support.

Given this teaching, it would have been obvious to one skilled in the art to modify the Miller devices by providing an angle adjustable ramp for providing a greater amount of resistance due to gravity. This would be accomplished by providing angle adjustment means within the upright 12 for vertically moving the support for the ramp 32.

***Allowable Subject Matter***

14. Claims 27,29,31,32 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steve R. Crow whose telephone number is 571-272-4973. The examiner can normally be reached on Reg:8:30-6;Off First Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cary O'Connor can be reached on 571-272-4715. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

